IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

SUMMIT CARBON SOLUTIONS, LLC, Plaintiff, v. IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA, Respondent, and SIERRA CLUB IOWA CHAPTER, Intervenor, and OFFICE OF CONSUMER ADVOCATE, Intervenor.	Case No. 05771 CVCV062900 **ORDER DENYING MOTION FOR PERMANENT INJUNCTION**

Introduction and Procedural History

Petitioner, Summit Carbon Solutions, LLC ("Summit"), seeks to build a pipeline crossing Iowa that would transport CO2 emissions from ethanol plants to permanent storage in North Dakota. As part of the process for seeking a permit for the project, Summit had to provide notice of public meetings to land owners potentially impacted by the project. To provide these notices, Summit spent time and money to compile a list of more than 10,000 landowners (the Landowner List"). Summit submitted the Landowner List to the Iowa Utilities Board (the "Board") at the Board's request, but Summit asked that it remain confidential.

Sierra Club Iowa Chapter ("Sierra") is working with certain landowners to oppose the pipeline. It filed an open records request pursuant to Iowa Code Chapter 22 seeking the

Landowner List. Sierra asserts that the Landowner List will help landowners communicate with one another and band together in their opposition. The Board provided Summit with time to seek an injunction preventing disclosure and has continued to keep the Landowner List confidential pending the outcome of this proceeding.

Summit filed its Petition for Temporary and Permanent Injunctive Relief and Motion for Temporary Injunction on December 14, 2021. Sierra and the Office of Consumer Advocate ("OCA") were both subsequently granted permission to intervene in this case. A hearing on Summit's Motion for Temporary Injunction was held on February 4, 2022. Notably, only Sierra opposed granting temporary injunctive relief. The Court granted the Motion for Temporary Injunction on February 11, 2022. Sierra filed a Motion for Summary Judgment on March 21, 2022. Following a hearing, that Motion was denied on June 2, 2022. A trial was held on July 7 and August 3, 2022, regarding Summit's request for permanent injunctive relief.[1] Bret Dublinske represented Summit. Jon Tack represented the Board. Wallace Taylor represented Sierra. Anna Ryon represented OCA.

The evidentiary record at trial was limited. Sierra and OCA each presented one witness. Summit's Appendix to its Resistance to Sierra Club's Motion for Summary Judgment was admitted as Exhibit 1 on July 7, 2022, the first day of the trial in this matter. The Court also noted on the record at trial that it would consider two documents designated by Sierra – the Board's Answers to Interrogatories Propounded by Intervenor Sierra Club Iowa Chapter and the Board's December 16, 2021, Order Regarding Filing Requirements and Addressing Survey

[1] The trial was continued to a second day because a witness fell ill and was unable to attend on the originally scheduled trial date.

Timing. Those documents are both contained in the docket in Sierra Club's Appendix to its Motion for Summary Judgment. No other documents were offered or admitted at trial.

Exhibit 1 p. 10 (App. p. 8) reflects that there was a verbal request from Board staff for the informational meeting mailing list made on July 13, 2021, in docket no. HLP-2021-0001. Exhibit 1 p. 11 (App. p. 9) reflects that a similar request was made on September 30, 2021, in HLP-2021-0002. The Board's December 16, 2021, Order reflects that the applicant in HLP-2021-0001 is Summit and the applicant in HLP-2021-0002 is Nustar Pipeline Operating Partnership L.P. It is unclear whether Nustar refused to provide the requested information or the Board simply ordered the information be produced before Nustar had the opportunity to respond to the informal request. The third docket addressed in the Order is HLP-2021-0003, in which the applicant is Navigator Heartland Greenway LLC. Exhibit 1 does not show that any informal request was made to Navigator prior to the formal December 16, 2021 Order.

In lieu of closing arguments, each party was allowed to submit a post-trial brief. Those briefs, along with the Board's Statement in Lieu of Brief, were filed August 5, 2022. Having reviewed the full trial record and considered the post-trial arguments, the Court enters this Order.

Analysis

Iowa's Open Records Act is contained in Iowa Code Chapter 22. Pursuant to Iowa Code § 22.5 the rights of persons under Chapter 22 may be enforced by injunction. Summit asserted that it was entitled to injunctive relief on multiple grounds. The Court rejected the majority of Summit's arguments but granted a temporary injunction based on the possibility that Summit

could prove the records at issue were confidential under to Iowa Code § 22.7(18).[2] That subsection states:

> 18. Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination. As used in this subsection, "persons outside of government" does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communicating with a government body with whom an arrangement for compensation exists.

Summit has the burden of proving that Iowa Code § 22.7(18) applies to the documents at issue. Ripperger v. Iowa Pub. Info. Bd., 967 N.W.2d 540, 550 (Iowa 2021) ("Disclosure is the rule, and one seeking the protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability.") (internal quotations omitted). That burden requires Summit to show that all the elements of the exception are met.

In its Order Granting Motion for Temporary Injunction ("Order"), the Court noted that two of the requirements for confidentiality are undisputed: that Summit was "outside government" and that the Board was a "government body." Order p. 3. Those elements remained undisputed at the time of trial. The disputed issues are thus whether the communication was required by a "procedure" and whether the Board could "reasonably believe" that Summit and similarly situated entities "would be discouraged from making" such communications "if they were available for general public examination." The Court will address each of these arguments in turn.

[2] To the extent that Summit maintains any of its other arguments in support of an injunction at this stage, the Court rejects them for the reasons stated in the Order Granting Temporary Injunction.

Whether the Landowner List Was Required by a Procedure

In support of the argument that the Landowner List was required pursuant to a "procedure," Sierra and OCA cite to the Board's December 16, 2021, Order (Sierra App. pp. 2-5) and the Board's Answers to Interrogatories 1 and 2 (Sierra App. pp. 9-11). Sierra and OCA contend that the language in the Order illustrates that, even prior to the Order, the Board had a procedure of requesting lists in relation to hazardous liquid pipeline projects. The language they point to is:

> The landowner mailing list is an important document that allows the Board to determine whether there are conflicts of interest with the proposed pipeline and whether proper notice has been provided to landowners in the corridor. **The Board therefore requires pipeline companies to file a mailing list for each county where the pipeline is proposed to be located.**

Sierra App. p. 3 (emphasis added). The Court is not persuaded by this argument.

The first sentence in the quoted section explains how the Board uses this list and why they requested it. It does not resolve the key question of whether the list was "required" as opposed to "requested." The second sentence uses the present tense verb "requires." The Court believes that this language does not apply to Summit because the list was requested of (and provided by) Summit prior to the issuance of this Order. Further, the Order specifically spells out the requirement that two other pipeline projects "shall file the mailing lists for each affected county by December 28, 2021." In other words, the Board "requires" compliance with the Order on a prospective basis. The trial record contains insufficient evidence for the Court to conclude that the Board was making any commentary as to past practice, particularly given that the past practice was not an issue in dispute before the Board.

In response to Sierra's Interrogatory No. 1, the Board stated: "The Respondent does not 'contend that the Iowa Utilities Board has not had a procedure prior to December 16, 2021, of

requiring applicants for permits of any kind to submit lists of landowners affected by the applicant's project to the Board.'" Sierra App. p. 9. Sierra asserts that because the Board is not contending that it did not have a procedure, that must mean it did have a procedure requiring submission of the landowner lists. The Court finds the interrogatory is ambiguous. The Board has not taken a position in this proceeding as to whether it previously had such a procedure.

Additionally, although the Board "began the routine practice of requesting a list or map identifying individuals provided notice of an informational meeting in June of 2019" (Sierra App. p. 11), "[n]o formal policy change was announced or promulgated by the Board in June of 2019 in regard to requests for informational meeting landowner mailing lists." Exhibit 1 (App. p. 4). There is no evidence in the record that any policy or procedure regarding such lists was ever reduced to writing. Board Chair Geri Huser's trial testimony was that the "routine practice" language in the order indicated to her that this information was requested "some of the time." The Board's responses to Summit's interrogatories bear this out. Exhibit 1.

As OCA and Sierra argue, there are valid reasons the Board might ask for a list of landowners. As Chair Huser testified, the two predominant reasons are making sure that the applicant has provided the notice to landowners as required by Iowa Code § 479B.4 and making sure that the Board members do not have a conflict that requires recusal. If the Board had a policy of requiring landowner lists to be submitted in every case, it could be a procedure. If the Board had a policy of requiring that information in every hazardous liquid pipeline case, it could be a procedure.[3] If such a list was not always required, but the Board had generated specific

[3] The board did not request a landowner list regarding the Dakota Access Pipeline until after it was constructed. Thus, the provided list contained information regarding those landowners *actually impacted* by the project as opposed to a pre-informational meeting landowner list that reflects all landowners *potentially impacted.*

criteria that triggered when a landowner list would be required, it could be a procedure. The record suggests that none of these things existed. Rather, the Board considered applications on a case-by-case basis. Sometimes the Board or its staff informally requested landowner lists. Sometimes they did not. It appears that Summit was the first applicant for a hazardous liquid pipeline project to have been asked for the information. Summit's competitor, Navigator, was allowed to hold informational meetings despite not having provided such a list.

The Iowa Supreme Court has discussed the legislative purpose behind Iowa Code § 22.7(18).

> We conclude that the purpose of the foregoing legislation is reasonably clear. It is the legislative goal to permit public agencies to keep confidential a broad category of useful incoming communications which might not be forthcoming if subject to public disclosure. … An important consideration in the legislative history of section 22.7(18) is the fact that as originally introduced it did not apply to solicited communications. Prior to its enactment, it was amended so as to include solicited communications.

City of Sioux City v. Greater Sioux City Press Club, 421 N.W.2d 895, 898 (Iowa 1988). Press Club directly refutes the argument that the fact that the landowner lists were "solicited" means they were required by a procedure. Although the municipality had created a procedure for applying for the job of city manager that involved submitting an application, "[t]he candidates were not required to submit these applications because they were not required to apply for the job." Id. Here, Summit was not required to submit an application for its pipeline project.

The fact that Board staff evaluated the situation and then requested the information from Summit does not in and of itself mean that the information was "required by a procedure." Unlike an order from the Board, there was no formality to the request. Further, even if the evaluation and subsequent verbal request could be considered a "procedure" nothing in the record suggests that the information was "required" to be submitted by Summit. A "requirement"

would have some sort of penalty for non-compliance. The record does not contain any evidence establishing that if Summit failed to voluntarily submit the information that its application would have been rejected or otherwise negatively impacted. At most, it appears that an order requiring the information would have subsequently been issued by the Board.

For the foregoing reasons, the Court finds that Summit was not "required" to submit its Landowner List by "law, rule, procedure, or contract." That is not the end of the inquiry, however.

Whether the Board Could Have a Reasonable Belief of a Chilling Effect

The temporary injunction hearing did not involve witness testimony. The Court ruled based solely on affidavits from representatives of Summit and Sierra, a handful of exhibits, and the arguments of counsel. In its Order Granting Motion for Temporary Injunction, the Court stated:

> The Court finds that, given Summit's request to treat the information as confidential, and the fact that other similar companies did not voluntarily submit the information, the Board could reasonably believe that such communications would not be voluntarily provided if they would become "available for general public examination." Thus, the primary issue before the Court is assessing whether the communication was "not required by law, rule, procedure, or contract."

Order p. 4. The Court then went on to address the arguments of the parties regarding whether the information was submitted pursuant to a "procedure." However, the Court also stated:

> In sum, it appears undisputed that the lists were not required by law, rule, or contract, but there is a factual dispute as to whether they were required by "procedure." Summit bears the burden of proving that § 22.7(18) applies, but the Court recognizes the difficulty of proving a negative—the absence of a procedure. As the matter proceeds, the parties can conduct discovery about the Board's procedures on this issue. **A more detailed record may also be developed as to the record custodian's belief as to whether disclosing the lists would deter future voluntary communications.**

Id. (emphasis added).

Although OCA did not oppose the grant of temporary injunctive relief, it does oppose granting permanent injunctive relief. In its post-trial brief[4], OCA asserts, among other things, that "[t]here is no evidence that making the Landowner List public would have a chilling effect on companies seeking permits to construct hazardous liquid pipelines." OCA Brief p. 9. After thoroughly reviewing the trial record, the Court agrees.

The Iowa Supreme Court most recently addressed Iowa Code § 22.7(18) in Ripperger v. Iowa Pub. Info. Bd., 967 N.W.2d 540 (Iowa 2021). Ripperger involved requests by homeowners to be removed from the searchable online database of the Polk County Assessor's Office. The only issue in that appeal was whether the Assessor could reasonably believe that such requests would not be forthcoming if a list of people making such requests was publicly accessible. The Iowa Public Information Board and the District Court believed that the list of such individuals was not confidential under Iowa Code § 22.7(18). In a 3-1 decision, a majority of the Iowa Supreme Court disagreed.[5]

> In our view, the Assessor could reasonably believe persons would be deterred from requesting removal from the website search-by-name function if doing so put them on a public list. Indeed, the Assessor's legacy website promised confidentiality and numerous owners sought removal from the list in 2018 upon learning it may be publicized. We reverse the district court on that issue.

Id. at 544. But the record in Ripperger is very different from the trial record in this case. There is no relevant opinion from the Iowa Utilities Board as to its belief on the matter. There is no

[4] OCA's Post-Trial Brief is erroneously captioned "Motion to Strike Sierra Club's Pre-Trial Disclosure." A ruling on that previously filed Motion was not necessary because the parties ultimately reached agreement as to which prior aspects of the proceedings would be considered as part of the trial record. The contents of the trial record are discussed earlier in this Order.

[5] Justice Mansfield, in dissent, agreed with the District Court that the Assessor's belief was not reasonable.

witness testimony from people suggesting they would be unwilling to provide information or from any Board member indicating any applications had been withdrawn.

Summit did not present any witnesses to explain its reasoning in submitting the Landowner List when requested. It is undisputed that when responding to the staff request Summit requested confidential treatment of the Landowner List. However, Summit provided the Landowner List without any guarantee of confidentiality.[6] Ultimately, it is the Board's belief – not Summit's or the Court's – regarding a chilling effect that matters.[7] Ripperger v. Iowa Pub. Info. Bd., 967 N.W.2d 540, 553 (Iowa 2021) ("This is an objective test, from the perspective of the records custodian, not the [Public Information Board] or the district court. The district court and [Public Information Board] each erred by substituting its judgment for that of the record custodian. The partial dissent makes the same mistake."). Unfortunately, the Court has almost nothing to determine the Board's actual belief on this issue.

As previously noted by the Court: "The § 22.7(18) exemption was not raised by Summit in its arguments to the Board. Therefore, the record does not contain the Board's viewpoint on this issue." Order p. 4 fn 1. Since the temporary injunction stage, nothing further has been put into the record regarding the Board's viewpoint. Although Chair Huser testified at trial, no one questioned her about this issue. Sierra Club served an interrogatory asking the Board to provide details if the Board contended "that disclosing landowner lists to the Board would deter future

[6] The Board, even if it had wished to provide confidentiality, cannot override the Open Records Act.

[7] It is unclear whether pursuant to Ripperger the proponent of applying the exception must prove both that the government agency believes that parties would be discouraged from providing the information and that the belief is objectively reasonable, or if – in the absence of evidence about the agency's belief – it is sufficient to prove that such a belief *would be* objectively reasonable. The Court need not resolve this question because it finds Summit has not carried its burden under either standard.

submissions of such lists to the Board." No details were provided in response. Sierra Appendix p. 14. The Court is left to form is own opinion on what the Board might believe and whether a belief about a possible chilling effect could be reasonable.

It stands to reason that an applicant seeking approval from the Board for a project would want to comply with requests for information from Board staff. Although Summit purportedly, and understandably, wants to remain on good terms with the landowners whose information would be disclosed in response to the open records request, it is the Board that will determine whether the pipeline project may move forward. Apart from Summit's request for confidentiality, there is nothing in the record illustrating that any other entity proposing a pipeline shares similar concerns. And, as noted, Summit provided the information without knowing for certain whether it would be kept confidential.

Although Chair Huser testified that the Board had once requested a list it did not receive, she could not recall any specifics about that occasion. Additionally, Summit served the Board with Interrogatory No. 3 which stated:

> For all dockets IUB listed in response to Sierra Club's interrogatories as being a docket where such information was provided, state whether the information was provided, and whether it was provided in the public docket or not. For any docket where the information was not provided on request, state what actions were taken or consequences suffered by the party that did not provide such a list.

Exhibit 1 p. 7 (App. p. 5) (emphasis in original). The Board's answer stated, in part:

> The [Board] asserts that responsive replies were received in regard to each docket for which a response has been identified in the attached table of dockets, previously filed in response to the Motion for Summary Judgment in this case.

Id. In other words, in each docket where a landowner list was informally requested by the Board, it was received, despite the lack of any guarantee of confidentiality. The trial record contains no evidence that suggests any entity would refuse to provide such information going forward.

Summit has the burden of proof. It has failed to carry that burden with respect to proving that the Board could "reasonably believe" information such as the Landowner List would not be provided in the absence of confidentiality.

Further, it cannot be overlooked that even if there were a potential chilling effect created by making the Landowner List public, the Board could simply overcome any reluctance to provide information by ordering the applicant to provide it.

> Q. What would happen if an applicant refused to provide [a landowner list]?
> A. It depends on what context the request was made. If it's informal and part of a planning meeting versus in an order, they have different meanings.
> Q. They have different what?
> A. It means something differently. I can ask for something. An order directs that it be done.
> Q. Well, if an applicant refused to provide the information, could or would the board issue an order of requiring the information to be provided?
> A. Yes.

Trial Transcript Day 2 – Testimony of Geri Huser - 10:16 to 11:2. Indeed, the Board did just that in its December 16, 2021, Order that required two other pipeline applicants to submit landowner lists.

The ability to order the communications at issue makes this case distinguishable from those cases cited by Summit. In Ripperger, County could not force homeowners to apply to be removed from the database. In Greater Sioux City Press Club, the municipality had no authority to order people to apply for its job opening. In Des Moines Indep. Cmty. Sch. Dist. Pub. Recs. v. Des Moines Reg. & Trib. Co., 487 N.W.2d 666 (Iowa 1992), the district had no authority to force parents to speak to the committee investigating a principal.

Here, once an applicant his filed a proposal for a hazardous liquid pipeline, it appears undisputed that the Board may order that applicant to provide a landowner list. Iowa Code § 474.3 provides: "The utilities board may in all cases conduct its proceedings, when not otherwise

prescribed by law, in such manner as will best conduce to the proper dispatch of business and the attainment of justice." In the absence of such a list, the Board would be unable to determine compliance with the notice provisions of Iowa Code § 479B.4. Chair Huser acknowledged that she would not make a request for information from an applicant unless she believed the information was necessary for the Board to do its job. Issuing a formal order requiring the production of that information would clearly be requiring the information pursuant to a procedure. Given that the Board can order that such a list be provided, and that such a list would be subject to an open records request under those circumstances, it would be unreasonable for the Board to believe lists would not be voluntarily supplied by applicants upon request. Indeed, as noted above, the record does not include any specific evidence of a failure to comply with such a voluntary request.

Additionally, the Court recognizes that the purpose of the Open Records Act "is to open the doors of government to public scrutiny-to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." Iowa C.R. Comm'n v. City of Des Moines/Pers. Dep't, 313 N.W.2d 491, 495 (Iowa 1981). "'There is a presumption in favor of disclosure' and 'a liberal policy in favor of access to public records.'" Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 229 (Iowa 2019) (quoting Hall v. Broadlawns Med. Ctr., 811 N.W.2d 478, 485 (Iowa 2012)). Having held that voluntarily requesting documents is not a "procedure," a finding that this final element of Iowa Code § 22.7(18) has also been met would allow the Board and its applicants to withhold numerous documents from public scrutiny. In that scenario, the Board could simply "request" documents rather than requiring them. Applicants, knowing that only voluntary provision would keep the records confidential, would provide them before the Board found it necessary to order production. The Court is not suggesting that Summit

or the Board has any such ulterior motives, but this course of conduct would be permissible if a permanent injunction were granted. A government entity is not permitted to "work around" open records requirements. See Gannon v. Bd. of Regents, 692 N.W.2d 31, 39 (Iowa 2005) ("A government body may not outsource one or more of its functions to a private corporation and thereby secret its doings from the public.").

Conclusion

Because the Court concludes that the Board could not reasonably believe that applicants would be discouraged from voluntarily providing landowner lists to the Board if those lists were available for general public examination, Summit has failed to prove that this information is subject to the exception contained Iowa Code § 22.7(18). Accordingly, Summit is not entitled to a permanent injunction on that basis.

The Motion for Permanent Injunction is DENIED. The previously entered Temporary Injunction shall be lifted in fourteen days if no party has filed a request for an emergency stay with the Iowa Supreme Court. If such a stay is requested, the enforcement of this Order shall be delayed until the request for emergency stay pending appeal is either granted or denied.

IT IS SO ORDERED.

State of Iowa Courts

Case Number	**Case Title**
CVCV062900	SUMMIT CARBON SOLUTIONS LLC V IOWA UTILITIES BOARD
Type:	OTHER ORDER

So Ordered

David Nelmark, District Judge
Fifth Judicial District of Iowa

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